Nos. 84-871, 84-889, 84-1054, and 84-1069

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In the Supreme Court of the United States

OCTOBER TERM, 1984

LOUISIANA PUBLIC SERVICE COMMISSION, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

CALIFORNIA AND PUBLIC UTILITIES COMMISSION OF CALIFORNIA, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

PUBLIC UTILITIES COMMISSION OF OHIO, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

FLORIDA PUBLIC SERVICE COMMISSION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

ON APPEAL AND ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION TO DISMISS AND BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the Federal Communications Commission acted within the scope of its authority in determining that its prescription of certain depreciation practices for telephone equipment preempted state commissions from prescribing inconsistent depreciation practices.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-871

LOUISIANA PUBLIC SERVICE COMMISSION, APPELLANT

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OPINIONS BELOW

The opinion of the court of appeals is reported at 737 F.2d 388 and is reproduced in the Appendix to the Jurisdictional Statement (at A1-A23) in No. 84-871 (Louisiana)). The order of the FCC (the *Preemption Order*") is reported

at 92 F.C.C. 2d 864 and is reproduced at J.S. App. A24-A60.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1984, and petitions for rehearing and suggestions of rehearing *en banc* were denied on October 3, 1984 (J.S. App. A90). The appellant in No. 84-871 filed its notice of appeal on November 27, 1984 (J.S. App. A92), and purports to invoke this Court's jurisdiction under 28 U.S.C. 1254(2). The petitions for a writ of certiorari in Nos. 84-889, 84-1054, and 84-1069 were filed on December 10, 1984, January 2, 1985, and January 2, 1985, respectively, and invoke this Court's jurisdiction pursuant to 28 U.S.C. 1254(1). The appellant in No. 84-871 asks the Court to treat its jurisdictional statement as a petition for a writ of certiorari pursuant to 28 U.S.C. 1254(1) if the Court determines that an appeal does not lie.

STATEMENT

Local telephone companies are subject to regulation by both state and federal authorities. In 1980 and 1981, the Federal Communications Commission (FCC) adopted two orders changing the regulations that govern depreciation of certain telephone company equipment so as to bring those regulations into harmony with new competitive and technological realities in the industry. On requests for clarification of the effect of those orders on state agency ratemaking, the FCC declared that its new depreciation policies preempted inconsistent state agency actions. The Fourth Circuit upheld the FCC's ruling that its depreciation orders were preemptive.

1. The Communications Act of 1934 (the Act) grants plenary authority over interstate communications to the FCC (47 U.S.C. 151); and it reserves the regulation of purely intrastate service to the states (47 U.S.C. 152(b)). See, *e.g., North Carolina Util. Comm'n* v. *FCC (NCUC II)*, 552 F.2d 1036, 1044-1050 (4th Cir.), cert. denied, 434

U.S. 874 (1977). Complementary federal and state regulation of telecommunications under the Act generally has worked, and jurisdictional disputes were infrequent until the mid-1970s.[1] The FCC typically confined its attention to interstate service and acquiesced in state regulation of most aspects of local exchange service, asserting the full breadth of its regulatory authority only where there was a need for uniformity in the rules governing jointly-used property or where federal policies might be undercut by fragmented regulation (J.S. App. A40).

In recent years, however, federal policies encouraging competition often have confronted state regulatory policies that are more conducive to the continued monopoly provision of services and equipment (*id.* at A41). In several instances, the FCC has asserted its own authority as paramount and has declared that conflicting state regulation is invalid. The courts uniformly have affirmed the FCC's assertions of primacy in the regulation of jointly-used telecommunications services and facilities, including FCC actions in matters directly affecting state agency regulation of intrastate rates, where the FCC's actions were within its statutory authority.[2]

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[1]The conflicting claims of federal and state regulatory authority arise from the fact that the same local exchange facilities normally are used for both interstate and intrastate communications. Section 2(a) of the Communications Act authorizes the FCC to regulate those facilities insofar as they are used for interstate calls; Section 2(b) reserves jurisdiction to the states insofar as the facilities are used for intrastate calls. 47 U.S.C. 152(a) and (b); see *North Carolina Util. Comm'n* v. *FCC (NCUC I)*, 537 F.2d 787, 793-795 (4th Cir.), cert. denied, 429 U.S. 1027 (1976).

[2]*E.g., Computer & Communications Industry Ass'n* v. *FCC*, 693 F.2d 198 (D.C. 1982), cert. denied, 461 U.S. 938 (1983); *New York Tel. Co.* v. *FCC*, 631 F.2d 1059 (2d Cir. 1980); *California* v. *FCC*, 567 F.2d 84 (D.C. Cir. 1977), cert. denied, 434 U.S. 1010 (1978); *Puerto Rico Tel. Co.* v. *FCC*, 553 F.2d 694 (1st Cir. 1977); *NCUC II, supra; Sherdon* v. *Dann*, 193 Neb. 768, 229 N.W.2d 531 (1975); cf. *General Tel. Co.* v. *FCC*, 449 F.2d 846 (5th Cir. 1971).

2. A part of the function of regulating telephone company service is the determination of depreciation expenses to be allowed so that carriers may recover funds invested in equipment over the economic life of the equipment.[3] Section 220(b) of the Act authorizes the FCC to prescribe "classes of property" for which depreciation may be charged and to prescribe depreciation procedures; it states that the carriers "shall not" use any other classifications or depreciation procedures. The FCC is required, before prescribing any depreciation procedures, to "notify each State commission" and to "receive and consider" the views and recommendations of such commissions (Section 220(i)). The Commission may except the carriers in any state from its prescribed depreciation procedures, where such carriers are subject to state commission regulation, "if it deems such

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[3]A regulated carrier is entitled to an opportunity to earn a fair return on investment and to recover its reasonable and prudent expenses through rates for service. The carrier's revenue requirement includes operating expenses, taxes, depreciation expenses, and a return on the investment rate base. In public utility regulation, depreciation affects both the rate base and the expense element of the revenue requirement. The original cost of a given item of equipment goes into the rate base when that item enters service. As the item depreciates over time — as a function of "wear and tear" or technological obsolescence — the original cost in the rate base is amortized, according to a schedule that is based on the item's expected useful life. The annual depreciation charges accumulate in an account known as the depreciation reserve, which theoretically would equal the depreciable cost of the item at the end of the process. The depreciation reserve is a measure of the extent to which the carrier has recovered its investment in equipment. See P. Garfield & W. Lovejoy, *Public Utility Economics* 44-83, 94-114 (1964); see also 1 A. Kahn, *The Economics of Regulation* 117-122 (1970).

For example, a truck with an original cost of $10,000 and an expected life of 10 years would enter the rate base as a $10,000 item to be depreciated over 10 years. The carrier would be entitled to an opportunity to recover a reasonable return on the rate base, including the cost of the truck. Each year's depreciation would diminish the rate base by $1,000 and add an "expense" charge of $1,000 to the revenue requirement for that year.

action consistent with the public interest" (Section 220(h)). Thus, the Act gives the FCC primary authority to prescribe depreciation practices.[4]

The two substantive FCC orders underlying this case made three changes in the agency's depreciation prescriptions. In *In re Property Depreciation (ELG Order)*, 83 F.C.C.2d 267 (1980), reconsideration denied, 87 F.C.C.2d 916 (1981)), the FCC substituted "equal life group" depreciation in place of "vintage grouping." Grouping of telephone company equipment for depreciation purposes is required because telephone companies have so many individual items of equipment that it is not practical to depreciate each item individually. Under vintage grouping all items of a similar type installed in a year are depreciated over the average useful life for the group, even though the group might contain equipment with widely varying life expectancies. Under the equal life group method, the groups are smaller and include only those items whose expected lives

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[4]The Commission has prescribed uniform accounting systems and depreciation procedures for many years, and the states generally have accepted the prescriptions and followed them. See, *e.g., American Tel. & Tel. Co.* v. *United States,* 299 U.S. 232 (1936) (the organization representing state commissions joined the FCC as a party defendant in a petition for review of an accounting prescription). A practice has developed over the years in which representatives of the FCC, individual carriers, and the appropriate state agency hold periodic "three-way meetings" to agree upon depreciation rates that are consistent with the FCC's more general prescriptions. *E.g., Prescription of Revised Percentages of Depreciation,* 88 F.C.C.2d 1223, 1225 (1982). Through those meetings, the FCC generally has been able to accommodate the special concerns of state agencies without compromising its own depreciation policies unduly. The FCC also has allowed exceptions from general rules for particular states, as Section 220(h) permits, where that would not undermine federal policy or conflict with the public interest. See, *e.g., In re Amendment of Part 31,* 68 F.C.C.2d 902, 906-907 (1978).

are approximately equal.[5] The principal advantages of the ELG method are greater accuracy in allocation of costs and faster capital recovery for equipment with shorter lives. 83 F.C.C.2d at 277-286.[6]

The second revision in the *ELG Order* — adoption of the "remaining life" method in place of the "whole life" method (83 F.C.C.2d at 288-290) — deals with the problem of correcting for errors in forecasts of useful life. Under the "whole life" approach, the FCC required carriers to calculate depreciation charges each year as if the whole life of assets had been correctly estimated from the beginning, even when that estimate was erroneous. Under the remaining life method, there is a correction for erroneous forecasts in the length of useful life. This method permits carriers to allocate any unrecovered depreciation over the corrected remaining life estimate.[7]

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[5]For example, a vintage group might include all the new cable purchased in a given year, even though some of the cable might be expected to last several times as long as some other cable. The "life" for the vintage group would be the average life for all items in the group. In contrast to vintage grouping, there might be several equal life groups of cable for a single year; for example, an equal life group might include all the new cable purchased in a given year that has an expected useful life of five years.

[6]The depreciation method is the same under equal life and vintage grouping: straight-line depreciation over the average life of the items in the group.

[7]For example, an asset might be depreciated at 10% a year, on the assumption that it would last for 10 years. In the fourth year, after 30% depreciation, the "correct" useful life estimate might be revised to five years because of technological or competitive developments that would hasten the asset's obsolescence. Under the whole life method, the depreciation for the fourth and fifth years would be 20% a year, on the new assumption that it was known all along that the asset would last only five years. But the total depreciation for this asset under that method would be only 70% of the depreciable cost — 30% for the first three years and 40% for the last two. Under the remaining life method, the depreciation for each of the last two years in this example would be 35%, so as to recover all of the depreciable cost that remained unrecovered when the correction was made.

In *In re Uniform Systems of Accounts (Inside Wiring Order)*, 85 F.C.C. 2d 818 (1981)), the FCC determined that one class of property it earlier had prescribed as depreciable — inside wiring[8] — no longer should be capitalized and depreciated but should be treated as a current expense. Like the *ELG Order*, the *Inside Wiring Order* had its origins in relatively recent developments in communications markets and technology. The FCC decided that continuing to depreciate this expenditure over time had the same potential for out-of-phase capital recovery and for misallocation of costs among customers that had prompted the changes to equal life grouping and remaining life depreciation,[9] and so it removed inside wiring from the prescribed list of depreciable property.

Although the FCC and state agencies participating in the docket anticipated some immediate effect on rates (83 F.C.C.2d at 284-285, 293), no one sought review of the *ELG Order*. No party sought review of the FCC's *Inside Wiring Order* either.

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[8]"Inside wiring" for purposes of this decision includes the costs of material and labor associated with the installation of wiring inside the premises of a business or residence. It does not include categories of wiring that are considered permanent and might properly be capitalized as investment in plant of more general utility. 85 F.C.C.2d at 823-826.

[9]Competitive provision of many of the elements of station connections, including inside wiring, had made it necessary for the FCC to consider the propriety of continuing to impose such costs on the general body of ratepayers through capitalization and depreciation charges. The FCC decided that customers who had obtained station connections from sources other than the telephone company should not have to pay telephone rates that include depreciation and a return on investment generated by the telephone company's provision of station connections for other customers. The FCC already had concluded in a 1977 rate decision that "the causative ratepayer should bear the full burden of the costs of station connections" (*In re AT&T*, 64 F.C.C. 2d 1, 54-56 (1977); see also *Inside Wiring Order*, 85 F.C.C.2d at 819-820); 44 Fed. Reg. 48988 (1979)).

3. Two parties representing state agencies asked the FCC to clarify the preemptive effect of its depreciation decisions.[10] The Commission first decided, by a 4-3 vote, that its depreciation orders did not require the state commissions to follow the federal policy in their ratemaking proceedings.[11] On reconsideration the Commission unanimously ruled that state commissions had to follow its depreciation orders (J.S. App. A24).

The FCC decided, first, that Section 220(b) of the Communications Act forecloses the states from adopting depreciation rates and procedures different from those the FCC has prescribed unless the FCC has expressly excepted carriers in particular states from its prescription. The Commission noted that the plain language of the statute provides that "the Commission 'shall' make depreciation prescriptions, and that carriers 'shall not' charge depreciation different than that prescribed by the Commission" (J.S. App. A32). Other provisions of Section 220 are consistent with this plain reading — Section 220(i) requires that "states be given an opportunity to comment" before the FCC prescribes depreciation practices (J.S. App. A32) and Section 220(h) gives the FCC discretionary authority to grant exceptions to its depreciation prescriptions for carriers

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[10]NARUC Petition for Clarification (in CC Docket No. 79-105) (filed Apr. 30, 1981); California PUC Petition for Reconsideration (in CC Docket No. 79-105) (filed Apr. 29, 1981).

[11]The majority in that order held that Section 220 of the Communications Act in itself did not preempt the states from adopting accounting procedures that were different from those prescribed by the FCC (J.S. App. A61). It recognized that the FCC's actions under Section 220 could preempt "state regulatory actions that might interfere with or tend to frustrate policies or rules we have adopted," but saw "no occasion" to override state actions in this instance (J.S. App. A84). The dissent contended both that the Commission had intended its depreciation rules to be preemptive and that it was necessary for them to be so if the federal policies were to be realized (J.S. App. A86-A89).

" 'subject to state commission regulation' " (J.S. App. A32). The legislative history also supports a plain reading of Section 220(b), the Commission concluded, since Congress considered and rejected a provision that would have given states the power to prescribe separate depreciation rules for intrastate purposes (J.S. App. A35-A37).

Alternatively, the FCC found that even if the statute itself does not preempt the states, preemption is necessary in this case. The FCC had adopted its new depreciation rules in furtherance of a newly adopted policy of "encouraging competition wherever the market conditions will support such a policy," and its new depreciation prescriptions are needed to make the "marketplace * * * operate efficiently" (J.S. App. A44). It concluded that inconsistent state depreciation rules could give "improper signals * * * to the market" (*id.* at A45). Indeed, since 75% of the cost of affected equipment is allocated to intrastate use, adoption of inconsistent depreciation measures by the states that improperly timed capital recovery would likely "delay or prevent modernization" (*id.* at A46).[12] The FCC concluded

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[12]The FCC's concern that some states would not follow its depreciation prescriptions has proven correct. Although an appellate review proceeding was initiated promptly in a court with jurisdiction to stay the FCC's preemption order, not one of the many state parties involved in that proceeding sought a judicial stay. Yet a number of state agencies ignored both the substantive depreciation orders and the subsequent preemption decision in denying telephone company rate changes that purportedly were designed to carry out the FCC's prescriptions. See, *e.g., South Central Bell Tel. Co.* v. *Louisiana Public Service Comm'n*, 570 F. Supp. 227 (M.D. La. 1983), aff'd, 744 F.2d 1107 (5th Cir. 1984), jurisdictional statement pending, No. 84-870; *Southwestern Bell Tel. Co.* v. *Arkansas Public Service Comm'n*, 738 F.2d 901 (8th Cir. 1984), petition for cert. pending, No. 84-483.

that "it is essential to preempt inconsistent state depreciation practices to avoid frustration of * * * vital national policies" (*id.* at A48).[13]

4. The court of appeals affirmed the FCC's *Preemption Order* on June 18, 1984. The court found it "unnecessary to decide" whether Section 220(b) requires preemption as a matter of law (J.S. App. A8). Instead, applying this Court's decision in *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta,* 458 U.S. 141 (1982), the court of appeals held that the FCC had validly exercised its power to preempt. Under *de la Cuesta,* the court of appeals noted, the test is whether the FCC "meant to preempt, and whether such preemptive action is within the scope of the agency's authority" (J.S. App. A10; citing 458 U.S. at 154). Since the FCC clearly intended to preempt, the issue was whether the FCC acted within the scope of its authority. The court noted that "improper capital recovery does pose a true threat in today's competitive market" (J.S. App. A12). Although it would be possible to keep separate books for intrastate purposes, if state depreciation practices failed to reflect actual depreciation rates properly, "interstate service would then suffer the effects of delayed innovation" since the same equipment is used for intrastate and interstate purposes (*id.* at A13-A14). The court of appeals acknowledged that the FCC's decision would affect intrastate rates, but added that "the effect will only be ancillary to the FCC's primary statutory directive to regulate interstate communications" (*id.* at A11). The Fourth Circuit noted that is own prior decisions and those of other circuits uniformly permitted preemption by the FCC when necessary to advance federal

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[13]The FCC also granted a petition for a declaratory ruling, at the request of General Telephone Co. of Ohio, declaring that the Ohio Public Utilities Commission had acted inconsistently with the ELG Order when it had refused to allow rate increases that sought to implement the new depreciation rules (J.S. App. A48-A49).

policy, even though preemption would affect intrastate rates (*id.* at A14-A16). The court concluded that the FCC had acted "within its authority to ensure efficient operation of the interstate telephone network" (*id.* at A11).[14]

ARGUMENT

The Court should dismiss the Louisiana Public Service Commission's attempt to invoke the Court's appellate jurisdiction under 28 U.S.C. 1254(2) because the decision below did not expressly strike down any state statute. The Court should deny the petitions for certiorari because the court of appeals correctly decided the preemption issue in accordance with well-established precedent, because there is no legitimate conflict between that decision and the decision of any other court, and because the case does not raise important legal questions that this Court should address.

1. The Louisiana Commission seeks review by appeal under 28 U.S.C. 1254(2), which authorizes an appeal when "a State statute [is] held by [the] court of appeals to be invalid as repugnant to the Constitution." It contends that the court of appeals affirmed a ruling that invalidates state ratemaking orders, which are legislative in nature in Louisiana (Pet. 3-4). An appeal does not lie, however, because the Fourth Circuit did not expressly strike down any particular state ratemaking order.

"[S]tatutes authorizing appeals [to this Court] are to be strictly construed" (*Silkwood* v. *Kerr-McGee Corp.*, No. 81-2159 (Jan. 11, 1984), slip op. 7). An appeal under Section 1254(2) is available only in those cases "in which a state statute is expressly struck down on constitutional grounds" (slip op. 7). Where an exercise of state authority is

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[14] Judge Widener, who dissented in the *NCUC II* and *NCUC I* cases, dissented here as well, primarily on the ground that in his view the FCC had not established the need for federal preemption (J.S. App. A21).

invalidated in the court of appeals without reference to the state statute, a direct appeal does not lie (*ibid.*). The court of appeals held, on review of the FCC's *Preemption Order*, that inconsistent state ratemaking actions had to give way to the preemptive effect of the FCC's depreciation prescriptions (J.S. App. A8-A17). As in *Silkwood*, the court of appeals "did not mention" any particular state statute or rate order and did not purport to review any such statute or order (see *Silkwood*, slip op. 8). Accordingly, this case is not within the Court's appellate jurisdiction,[15] and the jurisdictional statement in No. 84-871 should be treated as a petition for a writ of certiorari pursuant to 28 U.S.C. 2103.[16]

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[15]Louisiana cites *Atchison, Topeka & Santa Fe Ry.* v. *Public Utilities Comm'n*, 346 U.S. 346 (1953), and *Lake Erie & Western R.R.* v. *State Public Utilities Comm'n*, 249 U.S. 422 (1919), in support of its invocation of the Court's appellate jurisdiction. In *Atchison, Topeka & Santa Fe*, a state court rejected a claim that a particular state commission's order violated a party's federal constitutional rights; this Court concluded that the case was properly before it on appeal under 28 U.S.C. 1257(2) (346 U.S. at 348-349). *Lake Erie & Western* also involved a federal constitutional attack on a particular state commission's order which was rejected by a state court; the Court found the order "legislative in nature" and hence a "state law" for purposes of the statutes regulating the court's appellate jurisdiction (249 U.S. at 424). Neither case is pertinent because the Fourth Circuit did not mention, much less strike down, any particular state rate order.

Louisiana also contends that the Fifth Circuit, in another case (*South Central Bell Telephone Co.* v. *Louisiana Public Service Commission*, 744 F.2d 1107 (5th Cir. 1984), jurisdictional statement pending, No. 84-870), upheld a district court injunction ordering a rate increase in Louisiana. But the court in *South Central Bell* did not invalidate a state statute on constitutional grounds; it merely imposed a specific remedy for violation of its order. In any event, the Fifth Circuit's action is not the action challenged by Louisiana's jurisdictional statement in this proceeding, which challenges the Fourth Circuit's decision upholding the *Preemption Order*.

[16]Should the Court disagree with our submission that Louisiana's appeal is not within this Court's appellate jurisdiction, the judgment in No. 84-871 should be affirmed for the reasons stated in the remainder of this brief.

2. The court of appeals correctly applied well-established preemption principles in affirming the FCC's order. On the same day the Fourth Circuit issued its decision in this case, this Court in *Capital Cities Cable, Inc.* v. *Crisp*, No. 82-1795 (June 18, 1984), reiterated those principles as follows: "[I]f the FCC has resolved to pre-empt an area of * * * regulation and if this determination 'represents a reasonable accommodation of conflicting policies' that are within the agency's domain, * * * we must conclude that all conflicting state regulations have been precluded" (slip op. 7, quoting *United States* v. *Shimer*, 367 U.S. 374, 383 (1961)). As the court of appeals concluded, the FCC's decision to preempt inconsistent state depreciation practices was permissible under this standard. The FCC has explicit authority under Section 220(b) comprehensively to prescribe depreciation practices; it clearly expressed its intention that its recent depreciation orders preempt inconsistent state practices; and the FCC's resolution of conflicting federal and state statutory policies was well within the scope of its authority.[17] In short, nothing in the court of appeals' decision departs from established preemption principles or warrants their reconsideration.[18]

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[17]Petitioner California contends (Pet. 9-12) that there was no conflict between state and federal depreciation policies. But the FCC outlined in detail the basis for its finding of conflict (J.S. App. A43-A49), and the court of appeals correctly upheld that finding (J.S. App. A12).

Judge Widener, who dissented, disagreed with the merits of the *Preemption Order*. However, whether the FCC's depreciation prescriptions will or will not "increase market efficiency, encourage technological innovation, and otherwise promote competition" (J.S. App. A20) is not a matter for determination by appellate courts. It was not the function of the reviewing court to make an independent appraisal of the economic soundness of the FCC's approach, and this Court does not sit to make such appraisals either. See *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. at 169-170.

[18]In addition, although the court of appeals found it "unnecessary to decide" the question, the FCC's decision that Section 220 itself preempted state regulation is sound. The statute requires the FCC to prescribe

3. The petitioners contend that an express reservation of regulatory authority to the states, contained in Section 2(b) of the Communications Act, 47 U.S.C. 152(b), deprives the FCC of authority it might otherwise have to preempt inconsistent state-prescribed depreciation standards.[19] The courts of appeals have rejected this contention repeatedly, and its resurrection in this case presents no occasion for further review. The Fourth Circuit correctly followed the uniform precedent of four circuits in holding that Section 2(b) is no bar to federal preemption of some aspects of state regulation. *Computer & Communications Industry Ass'n* v. *FCC*, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983); *New York Tel. Co.* v. *FCC*, 631 F.2d 1059 (2d Cir. 1980); *Puerto Rico Tel. Co.* v. *FCC*, 553 F.2d 694 (1st Cir. 1977); *NCUC II*, 552 F.2d 1036 (4th Cir. 1977). See

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the classes of property subject to depreciation and the percentages of depreciation for each such class, and forbids carriers to depart from the FCC's prescriptions (Section 220(b)). The statute is not limited on its face so as to exclude property jointly used for interstate and intrastate communications. The structure of the statute is consistent with preemption in that it requires the FCC to "notify" state agencies before prescribing depreciation standards and to "receive and consider" the views of those agencies (Section 220(i)). The statute also authorizes the FCC to "except" carriers from its prescriptions where such carriers are subject to state regulation "[if the FCC] deems such action consistent with the public interest" (Section 220(h)). This structure would make little sense if there were no congressional intention to preempt.

[19]Section 2(b) reserves to the states the authority to regulate intrastate communications. It provides, in part, that the FCC has no jurisdiction "with respect to * * * charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier."

The petitioners also invoke Section 221(b) of the Act, 47 U.S.C. 221(b), which reserves authority to the states to regulate local exchange telephone service in the limited circumstance in which the exchange straddles state lines. Section 221(b) adds nothing to the petitioners' argument. See *Computer & Communications Industry Ass'n* v. *FCC*, 693 F.2d at 216-217.

J.S. App. A14-A17.[20] These cases have held that Section 2(b) preserves state authority over purely intrastate matters, but that the FCC has ample authority under other provisions of the Act to preempt conflicting state regulation. Section 2(b), the courts have said, does not permit the states to issue a regulation which is "formally restrictive only of intrastate communications" but which "in effect encroaches substantially" upon the authority of the FCC (*NCUC I*, 537 F.2d at 791-793).

In *Computer & Communications Industry Ass'n, supra,* the District of Columbia Circuit held that Section 2(b) did not bar federal preemption merely because, as here, preemption affects state ratemaking. There, the FCC had determined that, in order to establish a competitive market for "customer premises equipment" that was used for both interstate and intrastate purposes, that equipment had to be severed from transmission rates and removed from tariff regulation at both federal and state levels (693 F.2d at 215). In contending that preemption was improper, the state commissions there attempted to distinguish the *NCUC* cases on the ground that they did not involve ratemaking. The court rejected that argument, holding that there is no basis for distinguishing between ratemaking and other regulatory functions in drawing the lines between federal and state authority.[21] The court of appeals in the present case

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[20]The Fourth Circuit also cited *General Tel. Co.* v. *FCC*, 413 F.2d 390, 398 (D.C. Cir.), cert. denied, 396 U.S. 888 (1969), which stated that the Communications Act "must be construed in light of the needs for comprehensive regulation and the practical difficulties inhering in state by state regulation of parts of an organic whole."

[21]The court explained:

> We fail to see any distinction in this case between preemption principles applicable to state ratemaking authority and those applicable to other state powers. The operative principle in this

correctly applied the same reasoning in upholding the preemption order here (J.S. App. A14). There is no need for this Court to disturb the well-reasoned body of case law that has developed on the question of regulatory authority over the jointly-used facilities of interstate and intrastate communications.[22]

4. There is no conflict between the decision below and that of any other court with jurisdiction to review the FCC's

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> case is precisely the principle that demanded state preemption in the *NCUC* cases.
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> * * * * *
>
> [T]he Act itself does not distinguish between authority over rates and authority over other aspects of communications. * * * Therefore, conflicting federal and state regulations * * * are no more acceptable under the Act when equipment rates are involved, as here, than when interconnection policies are involved, as in the *NCUC* cases.

693 F.2d at 216.

[22]The Florida petitioner contends that Section 220 itself reserves authority to the states to set intrastate depreciation rates (Pet. 14-15). Nothing in the language or history of that statute supports the contention (see J.S. App. A31-A42). Section 220 authorizes the FCC to prescribe depreciation rates, requires carriers to follow the prescription, and permits (but does not require) the FCC to exempt the carriers in a given state from its prescription if there is state regulation and if the FCC finds that an exemption will serve the public interest. Nothing in that provision can be read reasonably to bar the FCC from preempting state depreciation rules.

The Florida petitioner also errs in asserting (Pet. 17-19) that the decision here conflicts with *Federal Communications Comm'n* v. *Midwest Video Corp.*, 440 U.S. 689 (1979), and *National Ass'n of Regulatory Util. Comm'rs* v. *FCC*, 533 F.2d 601 (D.C. Cir. 1976). Both of those cases dealt with the extent of the FCC's jurisdiction over aspects of cable television, which is subject to FCC regulation that is "reasonably ancillary" to the agency's express authority over broadcasting. In refusing to allow the FCC to extend regulation to matters the courts did not regard as "reasonably ancillary" to broadcasting, neither of those cases held anything that is inconsistent with an assertion of preemptive authority in an area where the agency's substantive powers are express, as here. The specific language quoted from the *NARUC* case (Pet. 19), moreover, expressed only the views of a single judge and was not a part of the holding of the case.

authority to preempt. Petitioners point out that there is a conflict between the opinion below and a ruling of the Ohio Supreme Court that is before this Court on appeal. *Cincinnati Bell Tel. Co.* v. *Public Util. Comm'n,* 12 Ohio St. 3d 280, 466 N.E.2d 848 (1984), jurisdictional statement pending, No. 84-623. But the *Cincinnati Bell* case does not present the type of conflict that warrants review by this Court.

In *Cincinnati Bell,* the Ohio Supreme Court refused to overturn a rate decision of the State Public Utilities Commission where the Ohio Commission's decision had been challenged as inconsistent with the FCC's depreciation rules and its *Preemption Order.* The court held that the FCC's authority to adopt depreciation rules applies only to interstate ratemaking and that the FCC's *Preemption Order* was ultra vires (84-623 J.S. App. A8). The court's opinion contains no independent analysis of the FCC's authority. It quotes from a decision of the United States District Court for the Eastern District of Arkansas denying enforcement of the FCC's *Preemption Order,* states its agreement with that court's analysis, and concludes tersely that the state commission's depreciation methodology was reasonable and lawful. Although the district court decision on which the Ohio court relied already had been reversed by the Eighth Circuit before the Ohio case was decided (*Southwestern Bell Tel. Co.* v. *Arkansas Public Service Comm'n,* 738 F.2d 901 (8th Cir. 1984), petition for cert. pending, No. 84-483, no mention was made in the Ohio court's opinion even of the fact that it had been appealed. Nor did the Ohio Supreme Court address the Fourth Circuit's decision upholding the FCC's preemption order, which is challenged here. In dissent, Justice Brown of the Ohio Supreme Court acknowledged that "the federal circuit courts of appeals have exclusive jurisdiction in this area" and chided the majority for its "callous disregard" of the Fourth Circuit's decision (84-623 J.S. App. A22).

The Court of Appeals for the Fourth Circuit, by virtue of the filing of a petition for review of the *Preemption Order* there, became the exclusive judicial forum with authority "to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" that order (28 U.S.C. 2342; see *Federal Communications Comm'n* v. *ITT World Communications, Inc.*, No. 83-371 (Apr. 30, 1984), slip op. 4). The Ohio Supreme Court had no jurisdiction to rule on the validity of the FCC's order. Its attempt to rule on that question may warrant summary reversal by this Court; but it does not create a conflict that would warrant review of the decision of the only court that may adjudicate the lawfulness of the FCC's order. Otherwise, a court wholly lacking in authority over a matter could create a climate for review in this Court by ignoring the limitations on its own jurisdiction.

5. Contrary to petitioners' claims (Florida Pet. 8-17; Louisiana J.S. 19-22; California Pet. 9-16), judicial affirmance of the *Preemption Order* here does not raise unresolved questions of national consequence that warrant the Court's attention. The FCC resolved important regulatory matters in its depreciation orders and in its *Preemption Order*, but, as we have shown, those determinations and the court's opinion upholding preemption rest on clear statutory authority and well-established legal principles that do not warrant further review.[23]

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[23]The fact that the FCC previously had not asserted preemption in the area of depreciation neither undercuts its authority to do so when the occasion arises nor makes this case an unwarranted departure from the past. As the court of appeals found, there had been no need to consider preemption in the past "when state commissions tended voluntarily to follow federal directives" (J.S. App. A12). When the FCC perceived a threat to its implementation of federal statutory policies in the refusal of several state commissions to adhere to the federal prescription, it was entirely reasonable and proper for the FCC to exercise its discretion to preempt for the first time. That discretion, turning as it does on the agency's perception of actual conflict, by its nature would remain unexercised so long as the states generally adhered to federal rules.

Nor does this decision wrest all ratemaking power from the states and repose it in the FCC as petitioners contend (see, *e.g.*, Ohio Pet. 18-19). Depreciation is but one aspect — albeit, a significant one — of the ratemaking formula. State agencies remain free to set the rate of return, to determine the rate base, to consider the legitimacy of expenses, and to design the rate structure — all with an eye to state policies. The court here has merely allowed the FCC to exercise fully its express statutory authority to prescribe depreciation policy without interference from conflicting decisions of state regulatory agencies.

The *Preemption Order* has been followed by a small flurry of litigation between telephone companies and state agencies. *E.g., South Central Bell Tel. Co.* v. *Louisiana Public Service Comm'n,* 744 F.2d 1107 (5th Cir. 1984); *Cincinnati Bell Tel. Co.* v. *Public Util. Comm'n,* 12 Ohio St. 3d 280, 466 N.E.2d 848 (1984). Some of those cases now are before this Court on appeal or petition for certiorari. That litigation, we submit, only further confirms the correctness of the FCC's determination about the need to preempt in order to avoid conflict between state and federal regulation. If there had been no conflict of the kind that has provoked that litigation, there would have been no occasion to preempt. Those cases —none of which properly raises the issue of the FCC's authority to preempt — do not affect the inappropriateness of the *Preemption Order* as a matter for this Court's attention.

Finally, any further consideration of the policy questions raised by the exercise of the FCC's preemptive authority here should be by Congress, which has monitored the matter closely and has considered proposed legislation that would change the existing Section 220 and give authority

over depreciation for intrastate uses to state agencies.[24] Congress is well aware of the Commission's decision in this case and in the previous preemption cases, and is the appropriate forum for further consideration of desirable policy in this area.

CONCLUSION

The Court should dismiss the appeal in No. 84-871 for want of jurisdiction and treat the papers on which that appeal was filed as a petition for a writ of certiorari pursuant to 28 U.S.C. 2103. The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[24]See *Universal Telephone Service Preservation Act of 1983*, H.R. 4102, 98th Cong., 1st Sess. (passed by the House of Representatives, Nov. 10, 1983), 129 Cong. Rec. H 9701 (daily ed.). Section 7 of that bill (which was not passed in the Senate and consequently lapsed) would have given the state commissions authority to prescribe depreciation methods.